When the reference was made to the Industrial Court on June 1, 1976 section 60H of the Employment Ordinance, 1955 was still subsisting. It was repealed on January 1, 1977. The Industrial Court made its award on March 28, 1977. By that time section 60H had been repealed. There was a vacuum. Although the Industrial Court did not say so in so many words it would seem that it did not consider itself the appropriate forum to fill that vacuum. The proper authority at the time was the said Minister who could do so by virtue of his power to make regulations. Moreover, the Industrial Court did not decline jurisdiction on the question of formula. Respondent cited *Malayan Pineapple Co. Sdn. Bhd.* v. *Food Industry Employees Union*[9] where the Industrial Court considered the provisions of section 60G of the Employment Ordinance, 1955 and came to the conclusion that all claimants were entitled to retrenchment benefits except those who had been in continuous service with the company for less than three years. Respondent submitted that the wordings of section 60G were almost the same as section 60H and therefore the same principle should apply to retirement benefits. In that case the contention was that the award was wrong in law on the ground that the Industrial Court had no power under section 60G to award retrenchment benefits. In the present case the contention is just the reverse as the Industrial Court had the power under section 60H but did not use it when it ought to use it.

Further, respondent submitted that if the Industrial Court could not rely on section 60H then there was a trade dispute before it. This would give it jurisdiction to make an award on retirement benefits. By virtue of the meaning of "trade dispute" as defined in section 2 of the Industrial Relations Act it would be wide enough to include retirement benefit: see *National Association of Local Government Officers* v. *Bolton Corporation.*[10] Respondent stressed that there was nothing to prevent the Industrial Court from deciding on retirement benefits. It was contended that the retirement benefits should be increased.

There is a fundamental flaw in respondent's argument that the retirement benefits should be increased. The Industrial Court was entitled to say it would leave the matter as it was. If the Industrial Court was wrong regarding the effect of section 6OH it was merely an error of law within its jurisdiction to so decide as stated in *Fire Bricks'* case.[4] The main point is that the Industrial Court has not acted in excess of jurisdiction to warrant the issuance of *certiorari*. The decision of the learned Judicial Commissioner cannot be supported.

For reasons given we would allow the appeal with costs and set aside the order of the learned Judicial Commissioner. We would restore the award of the Industrial Court. Deposit to be refunded to appellant.

Appeal allowed.

Solicitors: *Skrine & Co.; Sri Ram, Chan & Chia.*

KOTA KINABALU INDUSTRIES SDN. BHD. v. DIRECTOR GENERAL OF INLAND REVENUE

[F.C. (Lee Hun Hoe C.J. (Borneo), Abdul Hamid F.J. & Abdoolcader J.) March 26 & May 7, 1981]

[Kuala Lumpur — Federal Court Civil Appeal No. 127 of 1980]

Revenue Law — Income Tax — Sale of properties by limited company — Whether gains or profits from business or realization of investment — Finding of fact by Special Commissioners — Appeal — Income Tax Act, 1967, s. 4.

The appellant company was incorporated to have the members of a family in one company and to build houses on vacant properties to let out for rent. The appellant held a number of properties and some of these were sold for profit. The appellant was assessed to tax in respect of the sale of (a) a vacant lot bought for the construction of a factory/godown but sold when it was found unsuitable for the purpose; (b) and (c) two lots of rubber lands and (d) a shop-lot.

The Special Commissioners held that the gain or realization from the sale of the vacant lot was a realisation of a part of its investment and therefore not liable to tax. They considered the sales of the other three items were adventures in the nature of trade and therefore the profits were liable to tax. On appeal, the appeal was dismissed by the High Court. The appellants appealed.

Held: (1) the Special Commissioners were entitled to find on the evidence that the appellant had engaged in a trade of dealing with land;

(2) the power of the High Court to hear appeals from the Special Commissioners is to review the decision of the Commissioners on points of law being bound by the facts which they have found provided always there is evidence on which they came to such conclusions of facts;

(3) in this case the learned Judge found no ground to interfere with the decision of the Special Commissioners and the appeal should be dismissed.

Cases referred to:-

(1) *C.I.R.* v. *Fraser* 24 T.C. 498, 501.
(2) *Lewis Emanuel and Son Ltd.* v. *White* 42 T.C. 369, 377.
(3) *Edwards* v. *Bairstow* 36 T.C. 207, 224.
(4) *American Leaf Blending Sdn. Bhd.* v. *Director-General of Inland Revenue* [1979] 1 M.L.J. 1; [1978] 3 All E.R. 1185.
(5) *International Investment Ltd.* v. *Comptroller-General of Inland Revenue* [1979] 1 M.L.J. 4.
(6) *J.P. Harrison (Watford) Ltd.* v. *Griffiths* (1962) 40 T.C. 281, 303.
(7) *Rellim Ltd.* v. *Vise* 32 T.C. 254.
(8) *Taylor* v. *Good* 49 T.C. 277.
(9) *Murray* v. *C.I.R.* 32 T.C. 238.
(10) *Brace-Girdle* v. *Oxley* [1947] 1 K.B. 349, 358.
(11) *C.I.R.* v. *Reinhold* 34 T.C. 389.
(12) *Balgownie Land Trust Ltd.* v. *C.I.R.* 14 T.C. 684, 691.
(13) *Ruhamah Property Co. Ltd.* v. *Federal Commissioner of Taxation* (1928) 41 C.L.R. 148.
(14) *Hudson's Bay* v. *Stevens* (1909) 5 T.C. 424; 101 L.T. 96 (C.A.).
(15) *Tebrau (Johore) Rubber Syndicate* v. *Farmer* (1910) 5 T.C. 658.
(16) *C.H. Rand* v. *Alberni Land Co.* (1920) 7 T.C. 629.
(17) *Alabama Coal etc. Co.* v. *Mylam* (1926) 11 T.C. 232.

HIGH COURT.

S. Woodhull for the appellant.

Zulkefli bin Ahmad Makinuddin (Senior Federal Counsel) for the respondent.

Cur. Adv. Vult.

Salleh Abas F.J.: In this appeal the appellant is dissatisfied with the finding of the Special Commis-

sioners of Income Tax that the transactions in which the appellant sold its rubber lands at a profit of $316,759 in early 1974 and a vacant shop lot at a profit of $5,000 in November 1973 were adventures in the nature of trade.

It is the submission of the appellant that these two properties were acquired as investments and that the gains derived from their sale are therefore not assessable to income tax and development tax as these were not the appellant's stock-in-trade and in selling them the appellant was not engaged in adventures in the nature of trade. The Federal Counsel who appeared for the Director-General of Inland Revenue submitted that the appeal should be dismissed because it deals with the finding of fact by the Special Commissioners. It is true that the court will not interfere with the finding of fact by the Commissioners, but this rule is only limited to the finding of primary facts. Where the conclusion drawn from these facts is either unsupported by evidence or runs counter to the construction of the Income Tax Act, such conclusion is open to judicial review: (*C.I.R.* v. *Fraser*[1] *per* Lord President (Normand) at p. 501; *Lewis Emanuel and Sons Ltd.* v. *White*[2] *per* Pennycuick J. at 377 and *Edwards* v. *Bairstow*[3]).

For the purpose of my judgment, it is necessary to state the facts of the case which are as follows.

The appellant is a company incorporated on July 1, 1964 with Datuk Hong Kim Sui as Managing Director. The original purpose of forming the company was to have all the members of the family of the Datuk in one company and to build houses and let them out for rent. The appellant's Memorandum and Articles (Exhibit A1) contained numerous objects. Among them are: —

"(A) To purchase, take on lease or in exchange, or otherwise acquire any lands or buildings or any other or interest in, and any rights connected with, any such lands and buildings;

(B) To develop or turn to account any land registered by or in which the company is interested or in particular by laying out or preferring the same for building purposes;

(J) To buy, sell and deal in property, merchandise goods and articles of all kinds, or to deal in all articles, substances, or things purchased produced or used in the course of any of the business which the company is empowered to carry on....

(Q) To carry on any other business (whether manufacturing or otherwise) which may seem to the company capable of being conveniently carried on in connection with the above or calculated directly or indirectly to enhence the value of or render profitable any of the company's property or rights.

(GG) To sell, lease, exchange, surrender, improve, manage develop, mortgage, dispose of, turn to account or otherwise deal with the undertaking, assets, property and rights of the Company, or any part thereof, and for such consideration as the company may think fit...."

Since its incorporation the appellant acquired a large number of landed properties. These are listed in Exhibit A10. They are six houses, one shop, three rubber estates, two vacant lots and partial interest in two other vacant lots. The appellant received rent for the houses and the shop, but received no income from the rubber estates and the rest of the properties. The appellant also carried on the business of trading in general goods and building materials, but incurred losses in respect of this business.

Out of these listed properties, the appellant sold three houses (items 1, 4 & 5 Exhibit A10), its interest in a godown lot (item 9), a vacant industrial lot (item 6), two rubber estates (items 7 & 8) and a vacant shop lot (item 12). The appellant continued to receive rent in respect of the remaining three houses (items 2, 3 & 10) and the shop, the rent for the shop being $4,300 annually. No income is forthcoming from the remaining rubber estate (item 11), nor from its share in a vacant lot (item 13).

The Director-General of Inland Revenue assessed the appellant in respect of the sale of vacant industrial lot (item 6), the two rubber estates (items 7 & 8) and the vacant shop lot (item 12). As regards the sales of other properties, these were not part of the case before the Special Commissioners or before me. Neither explanation nor information was given whether the appellant was assessed in respect of gains derived from these other sales. They are included in this case presumably for the purpose of showing that the impugned sales are part of the appellant's systematic and repeated dealings of its properties in general, and so these impugned sales must be no other than adventures in the nature of trade.

After hearing evidence and arguments of both sides the Special Commissioners found that only the sale of the two rubber lands (items 7 & 8) and that of a vacant shop lot (item 12) are adventures in the nature of trade. That being the case the assessment relating to the sale of industrial lot (item 6) was discharged, while those relating to the sale of rubber lands (items 7 & 8) and the vacant shop lot (item 12) were confirmed. The appeal before me therefore is confined to the sale transactions of the two rubber lands and the shop lot only.

Is this a case in which an owner of land is merely selling his lands i.e. simply realises their money value or is it one in which he is selling them as a business or in transactions as an adventure in the nature of trade? To answer this question not only are circumstances of the acquisition and sale of the properties relevant but also their nature, the objects for which the appellant was formed and what business the appellant did carry on are also factors of the highest importance.

The appellant's trading in general goods and building materials resulted in losses. This trading is not the main business of the appellant, and it is certainly not the main purpose for which the appellant was incorporated. The original purpose according to Datuk Hong Kim Sui was to incorporate members of his family into one company which would build houses on vacant properties to let out for rent. The object clauses in the appellant's memorandum of association go even further so as to enable the appellant to carry on the business of housing development and to deal in real estate. As trading in general goods is not its main business, the appellant's activities relating to its landed properties — i.e. acquiring lands, constructing buildings thereon, renting the buildings so constructed, and selling them must be the main pre-

occupation and business of the appellant. In my view these activities in no way can be described as secondary business of the appellant. They are the main business and in fact went beyond the original intention of appellant's incorporation, i.e. building houses for rent only.

According to the object clauses set out in the foregoing paragraphs the appellant is authorised to carry on the business of housing development and to deal in real estate. The appellant is entitled to acquire lands and buildings, clause (A), to develop them or turn them into account, clause (B) or to sell or lease them for such consideration as the appellant thinks fit (clause GG). The appellant is also entitled to buy, sell and deal with in any property merchandise goods and articles of all kinds (clause J) and to carry on any other business which is calculated directly or indirectly to enhance the value of the appellant's property or to tender it profitable (clause Q). In my view, these object clauses raise a *prima facie* inference that the appellant was carrying on a business of land dealing either as a land developer or as a real estate merchant. This business is far beyond mere constructing buildings for rental, which is said to be the original intention of incorporation. The *prima facie* case so raised is not easily displaced and it is for the appellant to rebut it. (*American Leaf Blending Sdn. Bhd.* v. *Director-General of Inland Revenue*,[4] *International Investment Ltd.* v. *Comptroller-General Inland Revenue*[5] and *J.P. Harrison (Watford) Ltd.* v. *Griffiths*[6]).

One of the appellant's objects is to develop and turn to account any land acquired by it or and in particular by laying out and preparing the same for building purposes. Yet so far only one house (item 1) was built by the appellant and this was sold to former Chief Minister of Sabah. In no other case did the appellant ever develop the land or prepare any layout for building purposes. It simply acquired some income-bearing properties e.g. houses and a shop and let them out on rent and it also acquired some non-income producing properties, e.g. vacant lots and rubber estates. If these rubber estates and the vacant shop lot were acquired for development purposes, one would expect the appellant not to sell but to keep them. Further if the intention of the appellant had been to receive rent or income from those properties it would not have purchased those non-income producing properties at all, especially the rubber estates which it kept for about nine years. The position seems to be that the appellant acquired these rubber lands (items 7 & 8) and the vacant shop lot (item 12) as an investment only with a view to re-sell them as soon as it could realise them at desired profits. Acquisition of properties with this intention does not bring the transactions within the case of a person who is purely and simply disposing of his capital but rather falls within the ambit of a person engaged in an adventure in the nature of trade. The sale may take many years after the properties were first acquired but this delay is immaterial because the delay may be due to the maturing of assets and the desire of getting a good price or inability to strike a good bargain.

The approach taken by the Special Commissioners to determine the question before them, in my view, is fully supported by law. They said in paragraph 11(i) of the case stated:—

> "In considering the appeal against the assessments of income tax and development tax in respect of the profits derived from the disposal of items 6 (industrial lot), 7 & 8 (the two rubber estates) and 12 (a shop lot) in Exhibit A10 . . . we took into account the different circumstances surrounding the acquisition and disposal of the respective properties."

We are not concerned with item 6 (the industrial lot) in this appeal as their decision went in favour of the appellant. Let us now examine their decisions with regard to the sale of the rubber lands and the vacant shop lot.

As regards the two rubber lands (items 7 & 8), the primary facts found by the Special Commissioners are as follows. These were acquired by the appellant on January 5, 1965 and December 22, 1964 respectively. These two rubber lands together with a house (item 5) were charged to Chartered Bank to secure overdraft facilities up to $235,000 for Teck Guan & Co. (Jesselton) Sdn. Bhd. in which the appellant had 20% interest and of which the appellant's managing director sat on the board. Teck Guan & Co. defaulted in payment of the overdraft and judgment was entered against it for $1,483,742.20 on March 1, 1968. To prevent the bank from proceeding to execute the judgment, Datuk Hong Kim Sui on April 25, 1971 undertook to pay the bank 20% of the adjudged amount by a monthly instalment of $2,000. He paid the instalments and by February 15, 1974 the amount which he was personally liable to the bank was reduced to $121,342.37. Subsequently the Datuk obtained the release of the charge of these two rubber estates by giving the bank two cheques for the amount post dated to February 15 and 28, 1974. Thereafter the estates were sold through two different brokers at a profit of $316,759. No income was derived from these two estates during the years in which they were held by the appellant. The Commissioners rejected the appellant's contention that the sale was due to the pressure by the Chartered Bank because there was no evidence at all to that effect. As Datuk Hong Kim Sui in pursuance of his undertaking on April 25, 1971 was regularly paying the bank $2,000 per month and was able to reduce the liability to $121,342.37, there being no urging from the bank either to sell the properties or to pay up this sum immediately, the release of the properties and their subsequent sales seem to be motivated by no other consideration than the large profit i.e. $316,759 which the appellant would and did make. I therefore find it impossible to disagree with the Special Commissioners who concluded:—

> "We do not see the necessity of obtaining release of the two properties and selling them to pay the balance due to the bank nor could the bank have any justification to press the appellant for full immediate payment of the balance since Datuk Hong Kim Sui was continuing to pay the bank $2,000 per month in satisfaction of the term of the said guarantee and undertaking, there being no evidence to the contrary. Moreover, these two properties from which no income was derived during the nine years of ownership by the appellant could not possibly have been retained as investments. Nor was any action taken by the appellant to develop them. They must therefore have been held with the intention of waiting for the land to appreciate in value."

Such finding and conclusion in my opinion is beyond

criticism. I therefore hold that the disposal of these two rubber estates was an adventure in the nature of trade and the gain derived therefrom is assessable.

As regards the vacant shop lot (item 12), this was acquired by the appellant in January 1973 at a price of $30,000. It was sold through a broker eleven months later at a profit of $5,000. Datuk Hong Kim Sui said in his evidence that the lot was acquired for the purpose of constructing a shop house thereon, but owing to lack of funds to build a shop on it simultaneously or about the same time as the owners of adjacent lots were building up on their properties, the appellant was forced to sell it. This evidence was rejected by the Commissioners, because about the time when the shop lot was sold the appellant purchased two properties: namely shop lot No. 8 in Segama Shopping Complex which it now rents out at an annual rent of $4,300 and a non-income bearing rubber estate (item 11) for $20,000 although the purchase of the shop lot No. 8 was financed by a bank overdraft of $359,000 and the purchase consideration of the rubber estates was reduced to $10,000 by setting off the debt owed by the vendor to the appellant. The rejection of Datuk Hong Kim Sui's evidence is a matter of credibility, which the Commissioners having seen and heard the witness are entitled to attach to the evidence given before them. The appellate court is not in a position to assess the probative value of such evidence. No fault could therefore be found against the Commissioners' finding that

"...We do not accept the appellant's evidence that he disposed of the shop lot because of lack of funds to develop it. We do not believe it was beyond the appellant's capacity to raise whatever funds required to build the shop-house. Instead it was well within its capacity to do so having regard to the number of properties it was having at that time." (p. 20 of Case Stated).

The conclusion to be drawn from the circumstance of acquiring these two new properties is that the appellant had the means and was able to raise money to build a shop on the vacant shop lot which it sold, if it so wished. But instead, he sold it for a profit of $5,000 through a broker. The acquisition of these two new properties points to a conclusion that the properties sold were not acquired originally as investment, because if they were so acquired, the appellant would not have sold the vacant shop lot especially in view of the fact that the shop, if built, would have, according to its own evidence, fetched a good rent. Thus the fact that it was sold without the shop being built on it clearly shows that it was not acquired as an investment. It seems to me, therefore, the Commissioners' finding and conclusion that when selling the lot the appellant was engaged in an adventure in the nature of trade, is fully justified.

Thus having regard to the nature of the appellant's business, the main object of its incorporation stated in its memorandum, the nature of the properties acquired and sold by it, the circumstances in which the acquisition and sale took place, I found no ground at all to interfere with the decision of the Special Commissioners.

I therefore dismiss the appeal with costs.

From the above judgment the appellant appealed to the Federal Court.

FEDERAL COURT.

S. Woodhull for the appellant.

Zulkefli bin Ahmad Makinuddin (Senior Federal Counsel) for the respondent.

Cur. Adv. Vult.

Lee Hun Hoe C.J. (Borneo) (delivering the judgment of the Court): This appeal raises the question whether profits derived from the sales of certain properties were chargeable to tax by virtue of sections 4(a) and 2 of the Income Tax Act, 1967. Section 4(a) speaks of gains or profits from a business for whatever period of time carried on. "Business" is defined in section 2 to include, *inter alia*, an adventure or concern in the nature of trade. It is not in dispute that appellant received gains from the sales of certain properties. The question is whether the gains come within the definition of "business".

Appellant was incorporated on July 1, 1964 with Datuk Hong Kim Sui, one of its two subscribers to the Memorandum and Articles of Association as Managing Director. The properties it acquired were listed in Exhibit A10 (page 114 of the Appeal Record). This list was prepared and put in by appellant to show its affairs and to bring out the true character or nature of its business in the light of all its transactions. On the date of incorporation appellant acquired properties (items 1-5 in Exhibit A10) from Datuk Hong and his wife in exchange for shares in appellant. The original purpose of the incorporation of appellant was to have members of Datuk Hong's family in one company and to build houses on vacant properties to let out for rent.

Thirteen items were listed in Exhibit A10. The first five items refer to properties acquired from Datuk Hong and his wife in exchange for shares. Datuk Hong is also the Managing Director or Chairman of several other limited companies none of which is involved in land development. For convenience, understanding and ease of reference brief particulars are set out as follows: —

Item 1. This consists of two adjoining lots, T.L. 271 and 272 on which a house was built for its Managing Director as his residence. The house was completed in March, 1965 and occupied by Datuk Hong for a few months before it was sold to Tun Mustapha, then Chief Minister of Sabah in September, 1965. The house cost $148,681. It was sold for $173,500. After deducting $945 as expenses appellant made a profit of $23,874.

Items 2 & 3. These are two houses built on T.L. 1001 and 1002 let for rent.

Item 4. This is a house on Lot T.L. 1323 let for rent for some eighteen months until it was sold to Mr. John Lim as his residence. Mr. Lim was then the Assistant Manager of Cathay Pacific Airlines whilst Datuk Hong was Chairman of Tay Travel Service Sdn. Bhd. It was sold at a small profit of $498.

Item 5. This is also a house on Lot T.L. 1222 and let for rent. It was sold in August, 1971 for $80,000 of which $60,000 was paid to Chartered Bank, Kota Kinabalu for credit of Datuk Hong's personal guarantee on behalf of Teck Guan & Co. (Jesselton) Sdn. Bhd. A profit of $12,788 was made.

Item 6. This is a vacant Lot P.L. 28096 bought in November, 1964 for construction of factory/godown for $5,790. As it was not suitable for appellant's purpose it was sold in May, 1972 for $50,000 which included an agreed reimbursement of $36,239 incurred for earth levelling works. A profit of $7,971 was derived from the sale and was assessed to tax

in the notice of additional assessment for year of assessment, 1973 (see Exhibit A2 at pages 84-6).

Items 7 & 8. These are rubber lands described as C.L. 9174 and C.L. 28104 acquired in December, 1964 for $51,003 and $40,803 respectively. No income was derived from either property. Item 7 was sold in February, 1974 for $240,800. Item 8 was sold in January, 1974 for $136,248. These two properties and Item 5 were charged to Chartered Bank to secure overdraft facilities to the extent of $235,000 for Teck Guan & Co. (Jesselton) Sdn. Bhd. of which Datuk Hong was a Director and appellant had a 20% interest. The two properties were sold to meet payment to Chartered Bank. It is alleged that after deducting expenses profit derived from sale of item 7 was $4,816 and item 8 was $38,928. However, in the notice of additional assessment for the year of assessment, 1975 a profit of $316,759. was said to be derived from the disposal of properties (see Exhibit A2 at pages 84-6).

Item 9. This was a godown lot purchased at Government auction in April, 1965 for $30,000 jointly with three other persons. Due to lack of funds appellant company could not join the others to construct a godown. It sold its share for a profit of $3,000 in November, 1966.

Item 10. This was a house purchased for $42,000 in August, 1971 and let for rent.

Item 11. This was a rubber estate purchased for $20,000 in February, 1973. No income was derived from this due to difficulties in employing rubber tappers.

Item 12. This was a shoplot purchased for $30,000 in January, 1973. The shoplot was in a row of shoplots opposite Capital Cinema. Although funds could be raised to develop it, it was sold through a broker at a gross profit of $5,000 which was assessed to tax for the year of assessment, 1974 (see Exhibit A2 at pages 84-6). The Commissioners commented that the intention of purchasing the shoplot was not to develop it as an investment but to dispose of it at a profit.

Item 13. This was a vacant C.L. 9602 purchased in June, 1974 for $20,000. Appellant held one-third share. No income was derived from it.

Appellant was assessed to tax in respect of items 6, 7, 8 and 12. The Special Commissioners held that the gain or the realisation of item 6 was "a realisation of a part of its investment and therefore not liable to tax." They considered the sales of the other three items were adventures in the nature of trade and therefore the profits were liable to tax under section 4(a) of the Income Tax Act, 1967 and section 13 of the Supplementary Income Tax Act, 1967. In dismissing the appeal, Salleh Abas F.J. concluded his judgment by stating: —

"Thus having regard to the nature of the appellant's business, the main object of its incorporation stated in its memorandum, the nature of the properties acquired and sold by it, the circumstances in which the acquisition and sale took place, I found no ground at all to interfere with the decision of the Special Commissioners."

Appellant appealed.

We do not see how appellant can quarrel with the learned judge's statement that the sales clearly showed systematic and repeated dealings of appellant's properties in general. He was entitled to make such an inference.

The Special Commissioners dealt with the facts in some detail. Of the four items they found only one item to be realisation of investment and not subject to tax. It is a question of fact whether in a particular transaction appellant was carrying on a concern or adventure in the nature of trade. In *Edwards* v. *Bairstow*[3] and *Harrison (Watford) Ltd.* v. *Griffiths*[6] the House of Lords held that the finding as to whether there was an adventure in the nature of trade would be set aside by the court if "the Commissioner acted without any evidence or upon a view of facts which would not reasonably be entertained."

On this issue there are numerous authorities going one way or the other. It is not possible to draw a dividing line with any certainty. Each case or transaction must be decided according to its particular facts. There is nothing to show that the Special Commissioners were wrong in their finding that the original purpose of incorporating the appellant was to have members of Datuk Hong's family in one company and to build houses on vacant properties to let for rent. Equally, there is nothing wrong, having regard to the circumstances, for the Commissioners to say that a company might change or modify its character and that that was what happened to appellant. *Rellim, Ltd.* v. *Vise (H.M. Inspector of Taxes)*[7] was cited in support whilst *Taylor* v. *Good*[3] was distinguished. As regards items 7 and 8 they pointed out that in March 1968 judgment for $1,483,742.20 was entered against Teck Guan & Co. (Jesselton) Sdn. Bhd. not against appellant or Datuk Hong himself. It is not surprising that they should stress that there was no documentary evidence to show that bank was pressuring appellant between 1968 and 1971 to meet its obligations. As at January 1974 appellant's liability to the bank was only $124,000 and there was really no necessity to sell the two properties to pay the bank. Hence, they were right to say that, even if there was pressure from the bank to sell, this would be irrelevant as in the case of *Murray* v. *C.I.R.*[9] where although the taxpayer was pressed by his bankers to reduce his indebtedness, it was held that he was trading when he sold his rights to cut timber in one of his plantations.

The learned judge referred to the various objects in the Memorandum and Articles authorising appellant to carry on the business of housing development and to deal with real estate. Except for one house (item 1) which was sold to Tun Mustapha a few months after completion, appellant had not developed any other land or prepared any site for building purposes. As the learned judge quite rightly pointed out that appellant simply acquired some income-bearing properties, e.g. houses and a shop and let them out on rent and it also acquired some non-income producing properties, e.g. vacant shoplots and rubber estates. If these shoplots and rubber estates were acquired for development purposes appellant would have taken steps to develop them instead of selling them after keeping them for so long without any income. With respect, we agree with the learned judge when he stated in his judgment at page 40 of the Appeal Record that: —

"The position seems to be that the appellant acquired these rubber lands (items 7 & 8) and the vacant shop lot (item 12) as an investment only with a view to re-sell them as soon as it could realise them at desired profits."

The learned judge was justified at page 39 to make the following observations: —

"In my view, these object clauses raise a *prima facie* inference that the appellant was carrying on a business of land dealing either as a land developer or as a real estate merchant. This business is far beyond mere constructing buildings for rental, which is said to be the original intention of incorporation. The *prima facie* case so raised is not easily displaced and it is for the appellant to rebut it. (*American Leaf Blending Sdn. Bhd.* v. *Director-General of Inland Revenue*,[4] *Inter-*

national Investment Ltd. v. *Comptroller-General Inland Revenue*[5] and *J.P. Harrison (Watford) Ltd.* v. *Griffiths.*"[6]

We are urged to say that there is no evidence for the Commissioners to support their determination of facts. That is to say the conclusions reached by the Special Commissioners are inconsistent with, unsupported by and contradictory to their findings of primary facts. Denning J., as he then was, said in *Brace-Girdle* v. *Oxley*[10]: —

"The determination of primary facts is always a question of fact. It is essentially a matter for the tribunal which sees the witnesses to assess their credibility and to decide the primary facts which depend on them. The conclusions from those facts are sometimes conclusions of fact and sometimes conclusions of law... The court will only interfere if the conclusion cannot reasonably be drawn from the primary facts, ..."

There is nothing to say that a person in the position of a landowner cannot use his existing lands as an article of trade if the evidence warrants such inference. As long as the Special Commissioners had confined themselves to their finding of fact there would be no ground for questioning their decision. It was contended that they misdirected themselves on a question of law because it was alleged that they held that retaining of properties with a view of realising it at a profit must mean trading. Appellant complained that the Commissioners concluded at page 25 of the Appeal Record that: —

"... the only inference that can be drawn is that the appellant was then plunging into the waters of trade when it obtained release of these two properties and disposed of them very shortly after...."

The intention to retain and realise investment, even with profit as the motive, would not alter the character of the transaction to that of trading. This was so in the case of item 6. A property does not cease to be an investment merely because the taxpayer envisages that the property might be sold at a profit at some time: see *C.I.R.* v. *Reinhold.*[11] On the other hand, there is nothing to say that there need to be habitual or repetitive transaction before the characteristics of trade arises. As Lord Clyde L.P. in a passage in *Balgownie Land Trust Ltd.* v. *C.I.R.*[12] remarked: —

"A single plunge may be enough provided it is shown to the satisfaction of the court that the plunge is made in the waters of trade; ... Transactions of sale are characteristic of trade, but they are not necessarily distinctive of it, much depends on the circumstances."

Reference was made to *Ruhamah Property Company Limited* v. *The Federal Commissioner of Taxation*[13] where a passage in a judgment reads: —

"In our opinion the authorities show that the objects and powers of the company contained in its memorandum and articles of association are not decisive of the question whether the sale was an operation of business in carrying out a scheme of profit-making, but that a consideration of all the matters advanced by the company was relevant to a determination of that question *(Hudson's Bay Co.* v. *Stevens;*[14] *Tebrau (Johore) Rubber Syndicate* v. *Farmer;*[15] *C.H. Rand* v. *Alberni Land Co.;*[16] *Alabama Coal etc. Co.* v. *Mylam).*"[17]

In the end we have to go to the particular facts. The tribunal still has to decide whether the facts reveal a mere realisation of capital or whether they justify a finding that taxpayer went beyond this and engaged in a trade of dealing in land, albeit on one occasion only. This does not mean that we endorse the view that every isolated act of a kind that is authorised by its Memorandum if done by a company necessarily constitutes the carrying on a business. The question is whether the Special Commissioners were entitled to find as they did on the evidence. The power of the High Court to hear appeals from the Special Commissioners is to review the decision of the Commissioners on points of law being bound by the facts which they have found provided always there is evidence on which they come to such conclusion of facts.

As regards items 7 and 8 the learned judge referred to the findings of the Commissioners at page 42 of the Appeal Record: —

"We do not see the necessity of obtaining release of the two properties and selling them to pay the balance due to the bank nor could the bank have any justification to press the appellant for full immediate payment of the balance since Datuk Hong Kim Sui was continuing to pay the bank $2,000 per month in satisfaction of the term of the said guarantee and undertaking, there being no evidence to the contrary. Moreover, these two properties from which no income was derived during the nine years of ownership by the appellant could not possibly have been retained as investments. Nor was any action taken by the appellant to develop them. They must therefore have been held with the intention of waiting for the land to appreciate in value."

He expressed his view that: —

"Such finding and conclusion in my opinion is beyond criticism. I therefore hold that the disposal of these two rubber estates was an adventure in the nature of trade and the gain derived therefrom is assessable."

As regards item 12 he could find no fault with the finding of the Commissioners at page 43 of the Appeal Record that: —

"... We do not accept the appellant's evidence that he disposed of the shop lot because of lack of funds to develop it. We do not believe it was beyond the appellant's capacity to raise whatever funds required to build the shop-house. Instead it was well within its capacity to do so having regard to the number of properties it was having at that time."

No shop was built to be let for rent. He agreed with the finding and conclusion of the Commissioners that when selling the lot the appellant was engaged in an adventure in the nature of trade.

For reasons given we would dismiss the appeal with costs. Deposit to respondent on account of taxed costs.

Appeal dismissed.

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